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IN THE

Supreme Court of the United States

October Term - 1950

No. 732

EDWIN FRANCIS SIMONS, a minor, and ROBERT LAWSON SIMONS, a minor, by RUTH C. FJELSTAD (Their Mother and Next Friend), *Petitioners*

v.

EDWIN C. SIMONS

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Edwin Francis Simons, a minor, and Robert Lawson Simons, a minor, by Ruth C. Fjelstad (Their Mother and Next Friend), respectfully pray that a writ of certiorari issue to review an order of the United States Court of Appeals for the District of Columbia Circuit entered February 8, 1951, affirming an order of the United States District Court for the District of Columbia entered June 30, 1950, granting the motion of defendant, Edwin C. Simons, to dismiss petitioners' complaint in the action for maintenance and support of minor children entitled Edwin Francis Simons, a minor, and Robert Lawson Simons, a minor, by Ruth C. Fjelstad (Their Mother and Next Friend), plaintiffs, v. Edwin C. Simons, defendant.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit entered February 8, 1951 is reported in 187 F. 2d 364.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code, 1254 (1).

QUESTION PRESENTED

Whether the United States District Court for the District of Columbia properly invoked the doctrine of *forum non conveniens* to divest itself of jurisdiction of a transitory action for maintenance brought on behalf of infant children who live in Maryland against their father who is employed and works in the District of Columbia, but who lives in the State of Virginia; where there was no allegation or showing by the defendant that the plaintiff's choice of a forum was inconvenient to any of the parties to the action.

STATEMENT OF FACTS

Appellants are the two minor children of the appellee and have brought this action by their mother as next friend against their father to require him to provide them with adequate support and maintenance.

Appellants' mother and the appellee were married in the District of Columbia on March 31, 1926 and resided in the District of Columbia for seven years, when they thereafter moved into the adjacent county of Montgomery in the State of Maryland, where the appellants and

their mother have continued to reside up to the present time.

The appellants are both minors, Edwin Francis Simons being now 19 years of age, and Robert Lawson Simons being now 13 years of age.

Some time prior to March 4, 1948, appellants' mother and the appellee separated and on March 4, 1948 appellants' mother was awarded a final divorce from the appellee by a decree of the Circuit Court of Montgomery County in the State of Maryland on the ground of desertion. This divorce action proceeded on substitute service of process and was not contested by the appellee. Because the appellee was not before the court an order for support and maintenance of the minor children was not included in the final decree. Prior to filing the suit for divorce, however, appellants' mother and the appellee entered into a separation agreement under the terms of which appellants' mother was to have custody of the two children and the father was to contribute to the support of the two children. The amount of the contribution varied depending upon whether the appellants' mother remarried. If she remained single the appellee was to contribute $250.00 per month until the children reached the age of 21 years; but if the appellants' mother remarried the total amount of the contribution was to be reduced to $100.00 per month.

Since appellants' mother and the appellee were divorced, appellants' mother remarried and has divorced her second husband. Through this action the contribution which the appellee is now making for the support of the two children has been reduced to $100.00 per month.

The appellee has been employed by the Ford Motor Company in the District of Columbia since prior to his marriage to the appellants' mother and his annual in-

come is believed to be in excess of $15,000.00 per annum. Appellee resides in the City of Alexandria, Virginia.

The complaint in this action was filed in the United States District Court for the District of Columbia May 10, 1950 together with a motion for maintenance and support pendente lite. Defendant filed an answer to the complaint for maintenance and support, an affidavit in opposition to the motion for maintenance and support and a motion to dismiss the complaint.

On June 23, 1950 the case came on for hearing before the Trial Judge on defendant's motion to dismiss and on plaintiffs' motion for maintenance pendente lite. Defendant's motion to dismiss was heard first and was granted by the Trial Judge and an order dismissing plaintiffs' complaint was entered June 30, 1950. Plaintiffs appealed from the action of the Trial Court to the United States Court of Appeals for the District of Columbia Circuit. On February 8, 1951 the Court of Appeals affirmed the order of the Court below.

SPECIFICATION OF ERROR

The Court of Appeals erred in affirming the order of the District Court dismissing the plaintiffs' complaint.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The United States Court of Appeals concluded that the United States District Court properly had jurisdiction of the instant case and that the primary question is whether it could properly divest itself of jurisdiction by applying the doctrine of *forum non conveniens.* It is urged by the petitioners that the United States District Court misconceived the function of the doctrine of *forum non conveniens* and the factors which should be apparent

before it can properly be applied. This error on the part of the District Court is perpetuated to the detriment of the petitioners by the affirmance of the United States District Court's action by the United States Court of Appeals.

The criteria for the proper application of the doctrine of *forum non conveniens* has been clearly set forth in the opinion of this Court in the case of *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501, 67 S. Ct. 839.

In examining the majority opinion of the *Gulf Oil* case we find that the determining factors are stated to be:

> "An interest to be considered, and the one likely to be most pressed is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; * * *; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The Court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. *But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.*" (Italics supplied).

It should be noted that all of the factors stated in the above quotation, with one exception, favor the appellants' position. In applying the factors set forth to the facts in the instant case it is important to remember that the appellee is employed in the District of Columbia, earns his salary in the District of Columbia and maintains what should not be considered more than a transitory residence in the City of Alexandria, Virginia. If the appellee were sued in Virginia it would nevertheless

be necessary to conduct a portion of the litigation in the District of Columbia for the reason that it would be necessary to take depositions and examine appellee's employment records in the District of Columbia to ascertain the actual amount of his income.

After having obtained an order from the Virginia Courts, should the appellee then disobey the order of the Court the only method of enforcement of judgment would be through a contempt proceeding in Virginia which would provide little sustenance for his minor sons, or a suit in the District of Columbia upon the order obtained in Virginia. After obtaining a judgment in the District of Columbia, attachment of the appellee's salary in the District of Columbia would be possible. To require the appellants to proceed with suit in Virginia seems to invite an expensive merry-go-round of litigation, unwarranted and unjustified where minors are involved and unnecessary if the forum of the District of Columbia is open to these appellants.

The sole factor mentioned by the majority opinion in *Gulf Oil Corporation* v. *Gilbert* (supra) to support the action of the District Court appears to be the statement that: "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for Courts when litigation is piled up in congested centers instead of being handled at its origin." Obviously, the appellants could not pursue their rights in the jurisdiction in which their right of action originated, for the appellee father has astutely avoided the jurisdiction of the Maryland Courts.

With reference to the question of congested centers of litigation, it seems that the rights of minor children to support from their parents would be paramount in any event and they should not be required to go into jurisdictions wherein the enforceability of a judicial de-

cree would be limited to a citation for contempt as there are no known assets in that jurisdiction upon which to levy.

Since the enactment of Title 28, Sec. 1404 (a), June 25, 1948 there have been numerous applications to the Federal Courts for a change of venue. In the case of *Ferguson et al* v. *Ford Motor Co. et al,* 89 F. Supp. 45, 50, the Court stated:

> "This court has held that Section 1404 (a) is but a codification of the doctrine of *forum non conveniens.* It has not changed the criteria to be applied in determining the appropriateness of a given forum". * * *
>
> "It is quite clear that a case in which dismissal under *forum non conveniens* would be improper may be properly transferred under Section 1404 (a). See, Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir., 177 F. 2d 360; Amalgamated Ass'n v. Southern Bus Lines, supra; Cinema Amusements v. Loew's, Inc., supra. It is also clear that since the remedy available under Section 1404 (a)—i. e. transfer—differs from and is less harsh than the remedy available under *forum non conveniens*—i. e. dismissal—the court in the course of balancing the various factors which must be examined to determine the availability of a remedy, as set forth in the Gulf Oil case, supra, will give different emphases to those factors, Cinema Amusements v. Loew's, Inc., supra, and require less of a showing of "abuse of process" while being more willing to grant relief on a showing of inconvenience. Cf., Braucher, The Inconvenient Federal Forum, 60 Harvard L. Rev. 908, 933 (1947). To this degree a new standard can be said to have been established, although the standard would defy precise definition. Further, a new "principle" has certainly been introduced into Federal procedure, in the two amendments to *forum non conveniens* which Section 1404 (a) incorporates: transfer instead of dismissal and the applicability of the rule to anti-trust and FELA cases."

In the above case defendants sought to have the case transferred from the United States District Court, S. D. N. Y. to the United States District Court for the E. D. of Mich. The Court in denying the application stated:

> "A strong balance in favor of the movant must still be shown, although as above indicated, that balance is less than that required under *forum non conveniens.*"

The defendants then sought a Writ of Mandamus against Honorable Sylvester J. Ryan, judge, to require an order of transfer and in *Ford Motor Co.* v. *Ryan,* 182 F. 2d 329 the Court held that:

> "We come, then, to the question whether the judge abused his discretion in refusing to order the transfer. We think that, by # 1404 (a), Congress did not alter the standard theretofore embodied in the doctrine of *forum non conveniens,* despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the "convenience" of the witnesses or what otherwise might be the balance of 'convenience" as between "the parties."

A petition to the Supreme Court of the United States for a Writ of Certiorari was denied, 340 U. S. 851; 71 S. Ct. 79.

In the case of *Glasfloss Corporation* v. *Owens-Corning Fiberglas Corporation et al,* 90 F. Supp. 967 the defendant corporations moved for a change of venue from the United States District Court S. D. N. Y. to the United States District Court N. D. Ohio and as reasons listed seventy-six witnesses residing in or near Toledo who would testify in connection with the submission of voluminous documents which were contained in more than three thousand file drawers and the further fact that the District Court in Ohio was familiar with the case in that the defendants were operating under an injunction in the District Court of Ohio as a result of a civil anti-trust suit. The Court in denying the application for a change of venue under Section 1404 (a) stated:

> "I have no fear of conflict between the two courts. Although it might be efficient to have this matter determined by the Court which has great familiarity with it, I feel that this Court may properly determine the scope of the relief, if any, to which the plaintiff may be entitled, and that the interests of justice will be served here as well as there.
> It is true that a transfer to Toledo would simplify access to sources of proof, at least to that proof in control of defendants." * * *
> "It is a well known fact that the calendars of this Court are heavily congested. The case per judge is larger than that of any other District Court and is nearly seven times that of the Court in Toledo. Even though there is only one judge in the Toledo Court, it is fairly possible that this case will be reached sooner there than here, especially since it is a practice, as defendants assert, to assign a judge from the Eastern Division of that District to assist in Toledo." * * *
> "To change the venue herein something more must be shown than mere convenience of witnesses and parties. As Judge Ryan said in Ferguson v. Ford Motor Corp., supra:
> "It remains the law that a movant for relief under

> 1404 (a) must show a preponderant balance in his favor, for it is still only the exceptional case which merits relief under this section. The defendants' suggestion that it is my function to weigh the convenience of the parties and making a nice balance award the suit to that district court which, of several forums, appears to be the most convenient, is rejected." (89 F. Supp. 51)."

There are many other cases supporting the theory that before the Court can invoke the doctrine of *forum non conveniens* dismissing a case or order a change of venue under Section 1404 (a) transferring a case to another District Court there must be a strong showing that the balance of factors to be considered are in favor of the defendant; otherwise the plaintiff's choice of a forum should rarely be disturbed.

The appellee in the case before the Court has failed to set forth one single reason why the District of Columbia is an inconvenient forum for the appellee and it must appear clear from the record that there is no reason why this forum is not convenient. The time consumed by the District Court in dismissing the complaint would have been adequate to pass upon a motion for maintenance pendente lite and the delay in reaching trial upon the application for a permanent order of maintenance would not have been unduly burdensome upon either the appellants or the appellee.

CONCLUSION

It is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with the factors and standards to be considered by the Court in applying the doctrine of forum non conveniens as set forth in the decision of this Court in the case of *Gulf Oil Corporation* v. *Gilbert,* supra. In view of the importance of the question presented the petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioners

May, 1951